THE HONORABLE BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARTIN LUTHER KING, JR. COUNTY, et al.,

Plaintiffs,

vs.

SCOTT TURNER in his official capacity as Secretary of the U.S. Department of Housing and Urban Development, et al.,

Defendants.

No. 2:25-cv-00814-BJR

PLAINTIFFS' REPLY IN SUPPORT OF THIRD MOTION FOR PRELIMINARY INJUNCTION

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[1] This Reply incorporates the defined terms in Plaintiffs' Motion for TRO, Dkt. # 5, Second Motion for TRO and PI, Dkt. # 72, and Third Motion for PI, Dkt. # 186.

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I. INTRODUCTION

This Court should issue a second PI preventing Defendants' ever expanding efforts to dictate Plaintiffs' local policies by imposing unlawful grant conditions. Defendants largely rehash arguments this Court already rejected. They also unconvincingly attempt to dress the conditions up as "existing federal law," fail to refute violations of a statutory restraint on HUD, ignore HUD's regulatory procedural requirements, and brush aside irreparable harms identical to those the Court has recognized. The new Plaintiffs did not delay seeking relief; they responded promptly to Defendants' relentless roll-out of unlawful conditions on ever-more grants and jurisdictions. Now, many Plaintiffs need relief by August 14 to meet a statutory deadline or else forfeit federal funds. Thus, Plaintiffs respectfully request a second PI that applies previously granted relief to new Plaintiffs, enjoins HUD from imposing the challenged conditions on *any* grants, prohibits HHS from imposing similar conditions, and covers the entire grant-making process.

II. ARGUMENT

A. Plaintiffs Are Likely to Succeed on the Merits

This Court already ruled that Plaintiffs are likely to succeed on their claims that the CoC and DOT Grant Conditions violate the separation of powers doctrine, Congress has not authorized them, and their imposition is arbitrary and capricious in violation of the APA. Their arguments as to the Non-CoC HUD and HHS Grant Conditions fail for similar reasons.

1. Congress Has Not Authorized the Grant Conditions

Initially, Defendants do not address—much less dispute—that the Non-CoC HUD Grant Conditions violate 42 U.S.C. § 12711, which prohibits HUD from conditioning grants "on the adopt[ion], continu[ation], or discontinu[ation]" of lawful local policies. *See* Dkt. 186 at 12. Nor do they disclaim their transparent effort to leverage the Non-CoC HUD Grant Conditions to coerce

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Plaintiffs to replace their own local policies with the Trump administration's. The Non-CoC HUD Grant Conditions are unlawful for this reason alone.

Defendants primarily reiterate arguments this Court has already rejected. As before, Defendants begin by suggesting that agency regulations provide the requisite authority for the challenged conditions. Dkt. # 334 at 8 (citing 2 C.F.R. § 200.211(c)(1)(ii) (providing that federal agencies must incorporate among other things "executive order . . . directive[s]" into grant awards); 45 C.F.R. § 75.210(b)(1)(ii) (same as to HHS)). But, as this Court correctly explained, "an agency *regulation* cannot create *statutory* authority; only Congress can do that." Dkt. # 169 at 33.[2]

Next, Defendants argue the Non-CoC HUD and HHS Grant Conditions "merely require grant recipients to agree to comply with federal laws." Dkt. # 334 at 8, 10. But despite ample opportunity to do so, Defendants have yet to confront the mismatch between the "federal laws" the agencies claim to implement and the new and newly interpreted conditions themselves. As demonstrated below, because those conditions are untethered to existing law, general statutory clauses authorizing agencies "to require that grantees comply with federal laws" do not provide the authority Defendants need. Dkt. # 334 at 8 (citing 42 U.S.C. § 5304(b)(6)).

a.) The Conditions Are Not Authorized by Federal Nondiscrimination Law

Defendants again argue the challenged conditions simply require compliance with existing federal nondiscrimination law. Dkt. # 334 at 8–9. But they fail to address—and, tellingly, do not disclaim—the extensive record demonstrating the administration's intent to use those conditions, combined with the threat of FCA enforcement, to force compliance with the administration's novel

[2] HHS conditions prohibiting promotion of "gender ideology" under the guise of Title IX conflict with a regulation referenced in the very provision Defendants cite for their "National policy requirements" argument. *See* 45 C.F.R. § 75.210(b)(1)(ii) (citing 45 C.F.R. § 75.300(e), which states that HHS interprets statutes it administers that prohibit sex discrimination to "include a prohibition against discrimination on the basis of sexual orientation and gender identity").

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and unsupported reinterpretation of federal law as barring any form of DEI initiative. In issuing the PI, this Court rightly declined Defendants' earlier invitation to ignore the evidence, as of that date, showing how Defendants intend to enforce those conditions against any DEI initiatives. Dkt. # 169 at 34; *see also* Dkt. # 6 at 346 (DOT Secretary's letter stating "discriminatory [DEI] policies or practices" "presumptively violate[] Federal law," even when "described in neutral terms"); Dkt. # 5 at 24–25; Dkt. # 65 at 5 (Deputy Attorney General's memo stating recipients could violate the FCA by certifying compliance with nondiscrimination law while allowing transgender individuals to use bathrooms consistent with their gender identities). Defendants' subsequent actions reinforce this Court's finding that those conditions are "prohibitions on DEI initiatives." Dkt. # 169 at 34.

For example, in early July, HUD informed King County its consolidated/annual plan was being disapproved (even before King County formally submitted it) simply for using disfavored equity-related keywords. Dkt. # 223, Ex. A. HUD determined use of words like "equity" and "migrant" somehow undermined the required certification to "conform[] with applicable laws" and required King County to scrub these words and include "assurance statements" mirroring the challenged conditions. *Id*. at 6–9. New Plaintiffs, including Petaluma and Bellevue, received similar notices. Dkt. # 244 (Petaluma), Ex. B; Dkt. # 195 (Bellevue), Ex. A. No case law, however, suggests that using words like "equity" or "migrant" violates *any* law, refuting Defendants' claim the new conditions reflect preexisting requirements.

Significantly, last week, Attorney General Pam Bondi issued a memo ("Bondi Memo") purporting to reinterpret nondiscrimination law contrary to court decisions. Dkt. # 331. In addition to again singling out transgender inclusive policies as discriminatory (contrary to case law), the Bondi Memo identifies other purported "Examples of Unlawful Practices." These include use of proxies, such as geographic targeting and diversity statements, which "may appear facially

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neutral" but "are selected because they correlate with, replicate, or are used as substitutes for protected characteristics." *Id.* at 28. The Supreme Court, however, has "consistently declined to find constitutionally suspect" the adoption of race-neutral criteria "out of a desire . . . to improve racial diversity and inclusion"—even where the decision-maker was "well aware" the race-neutral criteria "correlated with race." *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 885–86 (4th Cir. 2023) (internal quotation marks and citation omitted) (citing, *inter alia*, *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 545 (2015)); *see also Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181, 220 (2023) ("The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is not like treating them differently because they are from a city or from a suburb."). Nor does Supreme Court precedent prohibit the use of diversity statements for the purpose of advancing racial diversity goals; to the contrary, in *SFFA*, the Court described these goals as "commendable" and "worthy" (though insufficient to justify race-based admissions). *Id.* at 214–15, 230 ("[N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life"); *United States v. Skrmetti*, 145 S. Ct. 1816, 1854 (2025) (Thomas, J., concurring) (suggesting strict scrutiny does not apply to "a university's decision to credit 'an applicant's discussion of how race affected his or her life'" simply because it is "inextricably bound up with" the applicant's race (cleaned up)).[3]

Defendants discount the Bondi Memo as "non-binding suggestions," Dkt. # 334 at 6 n.1, but they do not dispute it reinforces and expands upon the extensive record of their intent to enforce

[3] The Bondi Memo also states DEI trainings may be unlawful where they address topics like white privilege and "toxic masculinity," Dkt. # 331 at 31, even though this Court and several others have rejected similar arguments. *See, e.g.*, *Diemert v. City of Seattle*, 776 F. Supp. 3d 922, 941 (W.D. Wash. 2025); *Honeyfund.com, Inc. v. DeSantis*, 622 F. Supp. 3d 1159, 1171–72 (N.D. Fla. 2022), *aff'd sub nom. Honeyfund.com Inc. v. Governor*, 94 F.4th 1272 (11th Cir. 2024).

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the conditions based on the administration's novel and baseless reinterpretation of nondiscrimination law. The Bondi Memo's disregard for case law contrary to its anti-DEI stance and ominous warning of "legal, financial, and reputational risks associated with unlawful DEI practices" further confirms their intent to enforce the conditions against nearly all DEI policies.

Within this context, HHS's removal from its Grants Policy Statement (GPS) (after Plaintiffs' third PI motion was filed) of express prohibitions on DEI does not mask HHS's intent. The conditions still require recipients to agree that compliance with antidiscrimination law (as reinterpreted) is "a material condition of receiving" funds.[4] And while Defendants could easily disavow any plan to use the conditions to pressure recipients into accepting and implementing the administration's version of "anti-discrimination," they have not done so. Their silence is telling.

b.) The HUD Conditions Do Not Apply PRWORA or the Hyde Amendment

HUD's new condition requiring immigration status verification using SAVE, Dkt. # 206 at 15, does not implement PRWORA, as Defendants suggest, but rather violates it. PRWORA makes certain noncitizens ineligible for "Federal public benefit[s]." 8 U.S.C. § 1611(a). But PRWORA does not require verification until the Attorney General promulgates final regulations (which has not occurred) and then gives recipients a two-year period to comply. Dkt. # 5 at 17–18. Nor does PRWORA prohibit non-cooperation policies, Dkt. # 206 at 15, or using funds in a way that "supports" "removable or illegal aliens" even "indirectly," Dkt. # 261 at 35. By imposing these conditions without final regulations or a two-year compliance period and with broad new anti-immigrant requirements, HUD is attempting to rewrite PRWORA, not implement it.

[4] *See* HHS, HHS Grants Policy Statement at 18–19 (July 24, 2025), https://www.hhs.gov/sites/default/files/hhs-grants-policy-statement-july-2025.pdf. Having amended the GPS twice in a matter of months, HHS can easily undo its voluntarily removal of DEI language absent a PI.

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Defendants' suggestion that HUD's anti-abortion condition simply requires certifying compliance with the Hyde Amendment is demonstrably false. The Hyde Amendment only prohibits using federal funds to pay for or require a person to facilitate an abortion. It does not prohibit "promot[ing] elective abortions," as HUD now seeks to do. Dkt. # 5 at 16–17.

c.) Title IX and Generic Statutes Do Not Authorize the HHS Conditions

Far from authorizing a prohibition on so-called "gender ideology," courts have interpreted Title IX to *forbid* transgender discrimination, as Plaintiffs explained. Dkt. # 186 at 14. Ignoring this, Defendants insist the new HHS conditions only "require[] [that recipients] comply with Title IX." Dkt. # 334 at 9. Defendants obfuscate the conditions, which require recipients to "compl[y] with Title IX . . . *including the requirements set forth in*" the Gender Ideology Order, and to agree those requirements are "material terms" for purposes of the FCA. Dkt. # 236 at 13; Dkt. # 260 at 8. Plaintiffs are aware of no case (and Defendants cite none) suggesting Title IX "includes" the "requirements" of the Gender Ideology Order, particularly its ban on promoting "gender ideology." Far from enforcing Title IX, HHS seeks to graft new requirements onto it.

Defendants rely on generic statutes authorizing the HHS Secretary to prescribe the "form and manner" for grant applications and the "information" they must "contain." 42 U.S.C. §§ 254b(k)(1), 300ff-15(a), (b), 290ee-1(b)(1)(B). But these provisions only encompass prescriptions as to form, manner, and information. Defendants' suggestion such ministerial provisions authorize wide-ranging substantive conditions on controversial policy issues contradicts their text and the basic principle that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Defendants contend "[e]xecutive orders have long formed part of the requirements grant recipients must agree to." Dkt. # 334 at 9. To be sure, executive orders may direct agencies to

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exercise delegated authority with respect to grants in a manner consistent with specific congressional delegation. For example, Executive Order 11246 (referenced in the regulation Defendants cite, 24 C.F.R. § 1.4(c)(1), but rescinded by President Trump) directed agencies to enforce Title VI's nondiscrimination requirements "in conformity with Section 602 of the Civil Rights Act of 1964." Exec. Order No. 11246, § 303, 30 Fed. Reg. 12319 (Sept. 24, 1965). But Defendants cite no statute authorizing wholesale adoption of executive orders as substantive terms, as apparently intended here. The Constitution denies the President such "unilateral authority" over congressionally authorized funds. *City & Cnty. of San Francisco v. Trump* ("*San Francisco*"), 897 F.3d 1225, 1232 (9th Cir. 2018) (citation omitted).[5]

2. Imposing the Conditions Violates the APA

Defendants again argue that their decisions to impose grant conditions are unreviewable because they are committed to agency discretion under *Lincoln v. Vigil*, 508 U.S. 182 (1993). Defendants are wrong. This Court correctly concluded that "the agency action at issue in *Lincoln* differs materially from the actions at issue in this case." Dkt. # 169 at 28. *Lincoln* involved an agency's decision to cancel a discretionary program funded from a single lump-sum appropriation that covered all of the agency's activities. 508 U.S. at 185. Congress provided detailed legal standards for HUD and HHS grant programs against which Defendants' unlawful actions were readily reviewable. *See, e.g.*, 42 U.S.C. §§ 608, 672, 5301, 5304–05, 12746.

Defendants are equally wrong on the merits. As explained above, the challenged conditions

[5] While Defendants say "[t]he terms and all the referenced executive orders are on their face limited by existing applicable laws," Dkt. # 334 at 10, this is untrue of many conditions, Dkt. # 186-1 at 36–37 (gender ideology, abortion, immigration verification and enforcement, and executive order conditions). And, as discussed above, the administration's enforcement plans for the remaining conditions refutes that they simply reflect existing law. *San Francisco*, 897 F.3d at 1239 ("Savings clauses are read in their context.").

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are unauthorized and, thus, they were issued contrary to the Constitution and in excess of statutory authority and must be set aside. *See* 5 U.S.C. § 706(2)(B), (C). Defendants' actions also are arbitrary and capricious. Defendants do not dispute they offered no contemporaneous explanation when imposing the Grant Conditions, only citations to executive orders or impermissible (and unpersuasive) post-hoc justifications. *See* Dkt. # 186 at 15–16. Defendants contend they owed no explanation because the Grant Conditions are not subject to notice-and-comment rulemaking. *See* Dkt. # 334 at 12. This is wrong. "The APA, by its terms, provides a right to judicial review of *all* 'final agency action for which there is no other adequate remedy in a court,'" *Bennett v. Spear*, 520 U.S. 154, 175 (1997) (emphasis added) (quoting 5 U.S.C. § 704), whether or not that action is subject to notice-and-comment rulemaking. *See Cal. Communities Against Toxics v. EPA*, 934 F.3d 627, 635–36 (D.C. Cir. 2019). Defendants do not contest that the challenged grant conditions are final agency actions. As such, each agency must have "reasonably considered the relevant issues and reasonably explained its decision" to impose the challenged conditions. *Barton v. Off. of Navajo*, 125 F.4th 978, 982 (9th Cir. 2025) (cleaned up). Defendants also ignore that HUD has explicitly opted to subject grants to notice-and-comment rulemaking "even though such matters would not otherwise be subject to rulemaking by law." 24 C.F.R. § 10.1. HUD, having "cho[sen] to bind itself to published procedures," must do so despite any general APA carve-outs. *Castaneira v. Noem*, 138 F.4th 540, 551 (D.C. Cir. 2025).

Unable to defend their unreasoned decision-making, Defendants argue "it would be absurd to require [explanations] for the millions of grants the Defendant agencies issue each year." Dkt. # 334 at 12. But Plaintiffs challenge the imposition of conditions on *all grants* awarded under the programs at issue, not each individual grant. And Defendants cite no authority for their argument.

Thus, Defendants' imposition of the conditions should be set aside under the APA.

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3. The Grant Conditions Exceed Congress's Spending Clause Power

Defendants do not directly address Plaintiffs' claim that the non-CoC HUD and HHS Grant Conditions violate the Spending Clause. While they touch on related issues in their opposition and prior briefs, Dkt. ## 55 at 23–24, 151 at 4–6, 334 at 10, they have never directly responded to Plaintiffs' Spending Clause claim. Plaintiffs are likely to succeed on this claim as well.

B. Plaintiffs Will Suffer Immediate and Irreparable Harm

Defendants argue once again Plaintiffs' harm is purely monetary and thus not irreparable. Dkt. # 334 at 13. The Court has correctly rejected this argument. Dkt. ## 52 at 3, 169 at 14. Many of the harms Plaintiffs face are non-economic, including "impacts on the vulnerable populations that Plaintiffs serve." Dkt. # 52 at 3. For those that are economic, such as diversion of resources and reduction of infrastructure projects, Dkt. # 186 at 17, monetary damages are unavailable. *See Washington v. Trump*, --- F.4th ----, 2025 WL 2061447, at *15 (9th Cir. July 23, 2025) ("[E]conomic harm is irreparable when monetary damages are unavailable."). This harm is also imminent, with the statutory deadline for comprehensive/action plans fast approaching, and Plaintiffs' operations and communities at risk of losing critical funding. Dkt. # 186 at 4, 6–7, 9–10.

Defendants' request to deny relief to new Plaintiffs because "they waited until mid-July to seek injunctive relief that other Plaintiffs sought more than two months earlier," Dkt. # 334 at 14–15, falls flat. Defendants' own actions necessitated adding more jurisdictions and grant programs to this case and seeking another PI. For instance, Oakland was faced with the new DOT grant conditions for the first time after the case was first filed and amended. Dkt. # 240 ¶ 18. Similarly, in early July, HUD notified Petaluma and Bellevue their consolidated/action plans violated executive orders and gave them one or two days to alter their plans. Dkt. # 244 at 29–31; Dkt.

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195 at 14–17.[6] Defendants also have incrementally deployed the challenged conditions to new programs. HUD announced new conditions on CoC grants in March and April 2025, *see* Dkt # 7 at 12–25, but waited until June 2025 to extend the conditions to other HUD programs, Dkt. # 184 at 127. Defendants continue to release new guidance about how they intend to interpret and enforce the conditions. This haphazard rollout has forced grant recipients to continuously re-assess the conditions' impact on their programs and operations, and to expect that they may be forced to make hugely consequential decisions about funding with 24-hours' notice. Defendants cannot rely on a problem of their own making. PI relief should be extended to all Plaintiffs.

C. Defendants Raise No New Arguments as to the Equities, Bond, or Stay

Defendants repeat their prior balance of equities arguments and requests for a bond and stay, almost to a T. Dkt. # 334 at 14–15; Dkt. # 55 at 32–33. Defendants' arguments assume the conditions are congressionally authorized, but they are not. Further, Defendants never dispute the grants at issue are only being used for congressionally authorized purposes. The Court should again reject Defendants' arguments. Dkt. # 169 at 44–46; Dkt. # 44 at 14–15; Dkt. # 58 at 16–17.

III. CONCLUSION

Defendants fail to rebut that the challenged conditions are not authorized by Congress, exceed Congress's spending power, and violate the APA. HUD's recent threatened or actual rejection of several Plaintiffs' consolidated/action plans demonstrates the imminent and irreparable harm Plaintiffs face. Plaintiffs respectfully request the Court issue a PI by August 14, 2025, enjoining imposition of the conditions as set forth in the proposed order filed with this brief.

[6] King County, Bellevue, and other jurisdictions are members of a consortium, 4th Suppl. Marshall Decl. ¶¶ 2–3, i.e., "[a]n organization of geographically contiguous units of general local government that are acting as a single unit of general local government for purposes" of certain HUD programs, 24 C.F.R. § 91.5. To afford Plaintiffs complete relief, the PI should apply to consortia.

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I hereby certify that on August 6, 2025, I served a true and correct copy of the foregoing document on the following parties by the method(s) indicated below:

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